STATE OF MICHIGAN

COURT OF APPEALS

CITY OF BATTLE CREEK, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED February 11, 2014
v	No. 311872 Calhoun Circuit Court
BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant/Counter-Plaintiff-Appellee.	LC No. 11-000503-CL

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Plaintiff City of Battle Creek appeals as of right a July 24, 2012, order dismissing plaintiff's breach of contract claim pursuant to defendant Blue Cross Blue Shield of Michigan's motion for summary disposition and an August 6, 2012, order granting defendant's motion for summary disposition in regard to plaintiff's conversion claim. We affirm.

Plaintiff's case is one of several that governmental entities across Michigan have filed against defendant in response to defendant's practice of charging its self-insured health care customers an "access fee." In *Calhoun Co v Blue Cross Blue Shield Mich*, 297 Mich App 1; 824 NW2d 202 (2012), this Court addressed whether that practice constituted a breach of contract with Calhoun County. This Court found that it did not, and we find that decision is dispositive in resolving the issues that are raised in this appeal. The factual summary provided in *Calhoun Co* provides a brief factual background explaining how defendant's access fee came to exist:

> This case is one of a series involving defendant and various governmental entities. Calhoun County has for years contracted with defendant to administer its self-insured health care plan. Defendant is governed by various Michigan statutes and is legally obligated to subsidize insurance policies for any Medicare-eligible person who is not a member of a "group." Defendant internally refers to this subsidy as "other than group" (OTG). Defendant is also required to maintain a contingency fund and ensure that each "line of business" is independently funded. Defendant's self-insurance plan is one "line of business."
>
> In the late 1980s, defendant separately billed its customers for the cost of the OTG subsidy. Many self-insured customers were dissatisfied with paying the

> OTG charge; as a result, some customers hired defendant's competitors, while others simply refused to pay the OTG charge. Defendant ultimately decided to merge mandatory business charges such as the OTG charge into the hospital claims for self-insured plans. Thus, the various business charges were no longer "visible" on billing statements, but were instead built into the bill submitted to the customer (after a reduction had already occurred because of defendant's network discounts). According to defendant, these built-in charges were part of an access fee that was structured in part as the cost for access to defendant's hospital network discounts. [*Calhoun Co*, 297 Mich App at 4-5.]

In *Calhoun Co*, 297 Mich App 1, this Court interpreted contract provisions between defendant and Calhoun County that are identical to the contract provisions at issue in this case. *Id*. at 5-6. For example, each of the contracts includes this provision in Article III:

> [t]he Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant to 1980 P.A. 350 will be reflected in the hospital claims cost contained in Amounts Billed. [*Id*. at 6.]

Also, the contracts both define "Amounts Billed" as "the amount the Group owes in accordance with BCBSM's standard operating procedures for payment of Enrollee's claims." *Id*. Further, the Schedule As signed by the parties in this case in 2003, 2004, and 2005 contain identical language as Calhoun County's Schedule As from 1994 to 2006: "[y]our hospital claims cost reflects certain charges for provider network access, contingency, and other subsidies as appropriate." *Id*. at 7.

The primary issue addressed in *Calhoun Co* was whether the access fee provided for in the contract in that case was unenforceable because there was no specific price term for the access fee in the contract. *Id*. at 12, 18. This Court found that a contract existed between Calhoun County and defendant. *Id*. at 14-15. This Court then found that Article III of the contract provided for the collection of other fees (referred to by the parties as the access fee), and that they would be included in the hospital claims cost within the Amounts Billed. *Id*. at 15-16. Also, this Court noted that the "Amounts Billed" was defined in the contract as the amount owed in accordance with defendant's "standard operating procedures." *Id*. at 16. On that basis, this Court concluded that the terms of the contract in *Calhoun Co* "allowed for the collection of the access fee, the means for collection, and the process through which it could be determined." *Id*.

This Court in *Calhoun Co* went on to find that the lack of a specific amount for the access fee in the contract or Schedule As in that case did not render the access fee provision unenforceable. *Id*. at 17-19. Instead, this Court held that the amount must only be "reasonably ascertainable," and concluded that the access fee amount was reasonably ascertainable through defendant's standard operating procedures. *Id*. at 18. In reaching that conclusion, this Court referenced a "Development of Access Fee Factors" document provided by defendant in another related case and found that it:

> reflects an objective formula, based on a review of the fees and costs historically charged to plaintiff, for calculating the amount actually comprising the access fee.

> This manner of determining the contractually agreed amount of the access fee is entirely consistent with the plain language of the contract, as well as Michigan common law. [*Id*. at 19.]

This Court in *Calhoun Co* remanded that case to the trial court for entry of an order granting defendant summary disposition in regard to Calhoun County's breach of contract claim. *Id*. at 21.

In the present case, the trial court interpreted contract provisions that were identical to the provisions at issue in *Calhoun Co*. And, in its complaint, plaintiff claimed that defendant breached the contract when it charged the access fee because the contract and the Schedule As between the parties did not contain a price for the access fee or a method to determine the price, rendering any provision allowing the access fee unenforceable. Plaintiff maintained this argument throughout the litigation before the trial court. However, based on *Calhoun Co*, the trial court dismissed plaintiff's breach of contract claim.

Plaintiff contends that this Court's decision in *Calhoun Co* does not govern plaintiff's action against defendant, and that the trial court therefore erred in granting summary disposition to defendant on that ground. We review de novo a trial court's decision to grant or deny summary disposition. *Sherry v East Suburban Football League*, 292 Mich App 23, 34; 807 NW2d 859 (2011). Also, "[t]he existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Under MCR 2.116(C)(10),[1] summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

Under MCR 7.215, "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." "The rule of stare decisis generally requires courts to reach the same result when presented with the same or substantially similar issues in another case with different parties." *WA Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004). Here, as discussed above, the breach of contract issue presented by this case is the

[1] The trial court did not indicate which specific provision under MCR 2.116 it relied upon in granting defendant summary disposition under MCR 2.116(I)(2) regarding plaintiff's breach of contract claim. However, regardless of which subpart of MCR 2.116(C) the trial court used to support its grant of summary disposition, "[i]f summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart." *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). This Court in *Calhoun Co* reviewed that case under MCR 2.116(C)(10), and the trial court relied on that case in granting summary disposition to defendant in this case. We review this case under MCR 2.116(C)(10).

same or substantially similar to the issue presented in *Calhoun Co*, which would generally require the application of stare decisis in this case. *Id*. However, despite the doctrine of stare decisis, a rule of law from a case may not be binding on a subsequent case if that case is factually distinguishable. *Yankee Springs Twp v Fox*, 264 Mich App 604, 613 n 1; 692 NW2d 728 (2004). In *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 729; 209 NW2d 843 (1973), this Court explained that "[u]nless the facts are essentially different, Stare [sic] decisis will apply to provide the necessary uniformity, predictability, and stability of the legal process."

Plaintiff argues that *Calhoun Co* should not be applied to this case because that case is factually distinguishable. First, plaintiff argues that, unlike in *Calhoun Co*, there was testimony presented to the trial court in this case that showed that "the facts are undisputed that 'standard operating procedures' does not include a method to determine a price for the Access Fee." However, plaintiff provides no explanation or supporting facts for this assertion. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id*. at 339-340.

Regardless, plaintiff provided the trial court with witness testimony from other cases addressing defendant's access fee that defendant had a confidential process for determining the access fee. Also, the same Development of Access Fee Factors document before this Court in *Calhoun Co* was provided to the trial court in this case. Moreover, in plaintiff's reply brief, it argues that:

> [t]he question is not whether Defendant had a method to determine the amount of the access fees. Of course it did – the amount was not a random number plucked from thin air. But the issue is whether the contractual term "standard operating procedures" included that method.

Thus, plaintiff admits that defendant had a method to calculate the access fee, but apparently wishes us to distinguish between a "method" and a "standard operating procedure." However, a "standard operating procedure" is defined as "a set of fixed instructions or steps for carrying out routine operations." *Random House Webster's College Dictionary* (2010). Here, the evidence before the trial court and plaintiff's admission show that defendant had a set of fixed steps, or a regular *method*, for determining the access fee.

Plaintiff also argues that this case is factually distinguishable from *Calhoun Co* because there was testimony from two witnesses that an audit would not have revealed the existence of the access fee. However, those two witnesses did not testify in this case and their testimony was not presented to the lower court. This evidence is not properly before us. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) (holding that "[t]his Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal"); MCR 7.210(A)(1). Therefore, the issue presented by this case is the same or substantially similar to the issue presented in *Calhoun Co*, and plaintiff fails to show a factual difference that would prevent the application of stare decisis. *Yankee Springs Twp*, 264 Mich App at 613 n 1; *Topps-Toeller, Inc*, 47 Mich App at 729. Accordingly, we conclude that

summary disposition under MCR 2.116(C)(10) in regard to plaintiff's breach of contract claim was appropriate in this case because there was no genuine issue regarding any material fact, and defendant was entitled to judgment as a matter of law. The trial court did not err in granting summary disposition pursuant to MCR 2.116(I)(2), regardless of whether the trial court found a ground for summary disposition under MCR 2.116(C)(8) or MCR 2.116(C)(10). *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997).

Plaintiff also argues that the trial court dismissed its conversion claim based solely on the *Calhoun Co* opinion and that if we find that *Calhoun Co* does not control, plaintiff's conversion claim should be reinstated on remand to the trial court. However, we conclude that *Calhoun Co* does control this case, and find that defendant was contractually authorized to charge the access fee in this case. Thus, there was no wrongful act of domain over plaintiff's personal property in this case and plaintiff's conversion claim is meritless. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004). Summary disposition of plaintiff's conversion claim was proper under MCR 2.116(C)(8) because the claim was clearly unenforceable as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald